No. 2688

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Ralph K. Blair and Thomas Addis,
Plaintiffs in Error,

vs.

The United States of America,
Defendant in Error.

PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING.

Ralph K. Blair,
Plaintiff in Error and Petitioner herein.

By J. J. Dunne,
Mills Building, San Francisco,
Allen G. Wright,
Mills Building, San Francisco,
His Attorneys.

Thomas Addis,
Plaintiff in Error and Petitioner herein.

By Henry G. W. Dinkelspiel,
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T. E. K. Cormac,
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F. D. Monckton,
Clerk.

Filed this..................day of March, 1917.

FRANK D. MONCKTON, Clerk.

By..................Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now come Ralph K. Blair and Thomas Addis, plaintiffs in error and petitioners herein, and respectfully petition for a rehearing of the judgment and decision rendered herein February 19, 1917, and submit the following grounds in support of this petition:

This case, popularly known as the British neutrality case, is one of considerable importance. In order that it might be expeditiously tried and determined, on the questions of law involved, counsel stipulated, before the

trial court, what the facts were in the case, and the case was submitted to the trial court, accordingly, upon an "agreed statement of facts". The British Embassy, representing the British government, and the Department of Justice, representing our government, have both been anxious to have the court's opinion on this case, and it was because of that anxiety that the case took the unusual turn of being submitted upon an "agreed statement of facts". In the opinion filed by this court, reversing the judgment of conviction and remanding the case for a new trial, the questions of law affecting the merits of the case were not passed upon or determined. The issue of law, on the merits of the case, is the single one, whether the facts set forth in the "agreed statement of facts" establish the commission of any offence by the plaintiffs in error or either of them against the laws of the United States. This was the issue of law which the British Embassy and the Department of Justice were so anxious to have determined, and in the opinion filed in this court this issue of law remains undetermined. It appears from the record in this case that the trial judge in the court below, after the "agreed statement of facts" had been submitted to him, in presenting the case to the jury, not only undertook to explain to them the meaning of the statute upon which the indictment was based, which was clearly within his province, but in his charge to the jury imported into the case his own inferences, deductions and conclusions, and upon that basis directed a verdict of guilty to be returned. In commenting upon the proceedings in the court below, this court very

properly said that it was not permissible to import into such an "agreed statement of facts", by inference, deduction or otherwise, anything not expressly stated as a fact. Accordingly, this court determined that, under the circumstances, the trial court in the present case had not the power to order the jury to return a verdict of guilty and, for that reason, reversed the judgment of the court below and remanded the case for a new trial. The stipulation under which the "agreed statement of facts" was submitted commenced as follows:

> "In the above-entitled matter, the parties hereby agree that the facts hereinafter set forth are and may be treated as the facts in the cause, and that upon a consideration of said facts the court *may instruct the verdict* which the jury shall render in said cause" (trans. p. 99) (italics ours).

The stipulation of the parties, that the court might instruct the verdict which the jury should render, upon the facts set forth in the agreed statement, fell far short of a stipulation that the trial judge could instruct the jury peremptorily to find the plaintiffs in error guilty of the offence charged; a practice which was condemned as beyond the authority of the trial judge in *Sparf and Henson v. U. S.*, 156 U. S. 51, 105. The purpose of the stipulation was to authorize the trial judge to advise the jury of the verdict which, in his opinion, they should render, without peremptorily directing it. That this was likewise the construction of the stipulation given it by the United States Attorney, appears from the following statements made by him in the proceedings had before the trial court October 18,

1915, when the "agreed statement of facts" was submitted to the jury. Mr. Preston there said:

> "This is a case of considerable importance, and in order that the matter may be properly and expeditiously tried and determined, that is, on the questions of law involved, counsel have stipulated as to what the facts are in this case, with the further proviso that this court may pass upon the sufficiency of the facts or the insufficiency thereof, and *may either direct or intimate to the jury its opinion in the matter, the consent of the defendants being that the jury shall follow the court's intimation after a consideration of these stipulated facts.* That procedure simply means, if carried out, that this jury is here by agreement to follow the opinion of the court as to the sufficiency or insufficiency of the facts in this case * * * I have examined the law a little bit, and while I think that in the absence of a stipulation it is doubtful if a judge could instruct any kind of a verdict, I think it is proper *if the court will allow us to ask the jury if they would be willing to follow the opinion of the court after it is submitted*" (trans. pp. 97, 98).

To which Mr. Dunne, representing the plaintiffs in error, replied:

> "The position we take, your Honor, is entirely in line with the stipulation" (trans. p. 98).

It will be noted that Mr. Preston expected the court to intimate to the jury its opinion upon the sufficiency or insufficiency of the facts to establish the offence charged, and that he expected the jury to act in accordance with this intimation. It is also to be noted that Mr. Dunne on behalf of the plaintiffs in error merely represented to the court that their position was in line with the stipulation. When the trial judge read his charge

to the jury, however, he went far beyond an intimation to the jury of his opinion as to the sufficiency or insufficiency of the facts; he went far beyond a mere statement to them that in his opinion the facts would warrant a verdict of guilty. He built up the case, submitted by the government on the "agreed statement of facts", with his own inferences, deductions and conclusions, and what, in practical effect, was presented to the jury was not only the "agreed statement of facts" but the inferences, deductions and conclusions of the trial judge, coupled with a peremptory direction to return a verdict of guilty. Without in any way intending any reflection on the trial judge, who unquestionably proceeded in the utmost of good faith, the plaintiffs in error felt aggrieved by the course followed by the trial judge, and believed the particular way of presenting the case to the jury, adopted by him, was not that authorized by the stipulation. It was this procedure which caused this court to render its decision reversing the judgment and remanding the case for a new trial.

The plaintiffs in error, however, in calling this procedure to the attention of this court, did so diffidently, and frankly stated that it was their desire, notwithstanding this error, that this court should determine, as an issue of law, whether the facts set forth in the agreed statement were sufficient to justify a verdict of guilty. It was only in the event that this court should feel obliged to assume, in support of the verdict of the jury, that inferences lawfully could and actually had been drawn by the jury from the "agreed statement of facts" consistent with guilt, and that such inferences

could not be reviewed, that the plaintiffs in error urged a consideration of that error upon which the decision of this court has turned (opening brief of plaintiffs in error, pp. 172, 173, 174).

In the foreword to the oral argument of Mr. Dunne, printed with the permission of the court, the plaintiffs in error again refer to this matter, and request a consideration of this particular error of the trial court, only in the event that, in violation of the letter and spirit of the stipulation of the parties, it should be claimed that the verdict and judgment of the trial court rested on facts outside the agreed statement and that, no matter how unwarranted the inferences of the trial court might appear to the judges of this court, they were nevertheless bound to accept the same in support of the judgment; and the plaintiffs in error further stated that if this court believed

> "It to be within its power to decide this case upon the facts set forth in the agreed statement, the constitutional right to a trial by jury, referred to in our opening brief, is a right which we do not insist upon, no matter how the court may determine the case" (printed oral argument of J. J. Dunne, Esq., on behalf of plaintiffs in error, p. 5).

It may be true that when this error was called to the attention of this court, it could not disregard it, and it may be that, even had the error not been called to the attention of this court, it would have been obliged to note it, as it appears on the record. But the decision of this court, omitting as it does any determination of the merits of the case, has failed to determine that

question of importance upon which the British Embassy and the Department of Justice were anxious to have the court's opinion, and, in October of 1915, were desirous of having expeditiously determined.

The merits of the case are presented by the record before this court. In the assignment of errors, those referred to in paragraphs 3 to 21 inclusive (trans. pp. 182 to 190 inclusive) relate to errors of the trial court in charging and instructing the jury and refer to those inferences, deductions and conclusions imported into the case by the trial judge. In the assignment of errors, paragraphs 22 to 37 inclusive (trans. pp. 190 to 198 inclusive) relate to errors of the trial court, in its failure to give those charges and instructions to the jury, referred to in the paragraphs named. Of these, paragraphs 31, 32, 33, 34, 35 and 36 particularly raise the question of the sufficiency of the facts set forth in the "agreed statement of facts" to establish that an offence was committed against the laws of the United States, by the plaintiffs in error or either of them. The error of the court in receiving the verdict, in denying the motion for a new trial, in denying the motion in arrest of judgment, in entering judgment, in sentencing plaintiffs in error, and in not rendering judgment in favor of plaintiffs in error, are specifically referred to in paragraphs 38 to 45 of the assignment of errors (trans. pp. 198, 199). Paragraph 46 of the assignment of errors reads as follows:

> "That the said District Court erred in giving, making, rendering, entering and filing its final judgment in said action in favor of the United States of America and against these defendants,

> and/or each of them, in this, that said final judgment was and is contrary to law and to the case made and facts stated in the pleadings, 'agreed statement of facts', and record in said action" (trans. pp. 199, 200).

By paragraph 47, the sentence of the plaintiffs in error is assigned as error (trans. p. 200).

All of these assignments of error are repeated in the specification of errors, in the opening brief of plaintiffs in error herein (pp. 9 to 26 inclusive). The plaintiffs in error requested the trial judge, upon the facts set forth in the agreed statement, to direct a verdict of not guilty, and this request was denied (trans. pp. 129, 130 and 152), and the denial of this motion was assigned in the assignment of errors in paragraph 20 (trans. p. 190) and in paragraph 44 (trans. p. 199). And if the "agreed statement of facts" was in itself incomplete or insufficient to support a judgment, then under the principles of *U. S. v. Buzzo,* 18 Wall. 125, it was error to refuse to direct a verdict of acquittal. To this same effect, see *Vernon v. U. S.,* 146 Fed. 121, 126.

It is clear, therefore, that the record presents the issue whether the "agreed statement of facts" sets forth facts sufficient to establish the commission of an offence against the laws of the United States by the plaintiffs in error or either of them and that this court, therefore, is not precluded from passing upon the merits of this case.

It will be a matter of considerable disappointment to the British Government, and to the United States

Government as well, if this court cannot see its course clear to determine the merits of this case, and the plaintiffs in error for that reason, among others, are requesting this court, on rehearing, to file a supplementary opinion or, in such other way as to the court seem proper, express its opinion upon the merits of this case. In addition to the satisfaction which such a course would give to the two governments involved, it is respectfully submitted that such a further opinion would be proper and desirable from the point of view of the plaintiffs in error as individuals. If this case is remanded for a new trial, it may be again submitted to a jury upon the "agreed statement of facts". In such an event, in the absence of any further opinion from this court, the trial court would be without the benefit of the opinion of this court, when a similar motion would be made on behalf of the plaintiffs in error requesting the trial judge to direct the jury to render a verdict of not guilty. The same embarassment would arise if, on a retrial, the case were tried in the usual way and the evidence introduced went no further than to establish the facts admitted in the "agreed statement of facts". It can not be fairly assumed that the United States Attorney failed to incorporate in the agreed statement any material fact which he felt in a position to prove, and, that being so, it is reasonable to assume that, in the event of a retrial, even after the usual course, nothing further would be developed than appears in the "agreed statement of facts". If the case, however submitted, were retried, without any expression of opinion upon the merits of

the case from this court, it would be necessary to sue out another writ of error and bring the case before this court a second time, in order to have the issue of law determined which is now involved and is presented by the record now before this court.

Perhaps it may not be improper to add that the Congress has under consideration numerous amendments to the Federal Neutrality Statute, and it would doubtless be of assistance to the legislative branch of the Government to learn the views of the judicial department upon the proper construction of the provisions of the existing law.

There can be no doubt of the right of this court to grant a rehearing of the judgment rendered. On such a rehearing, if this court considers the merits of the case, and if it determines that the facts set forth in the agreed statement do not establish the commission of an offence by the plaintiffs in error or either of them against the laws of the United States, then this court in addition to reversing the judgment could, if it so desired, direct the discharge of the plaintiffs in error and the dismissal of the case, at least, unless the United States Attorney could assure the trial court that it was within his power to produce additional evidence and establish facts in addition to those agreed to in the "agreed statement of facts".

Section 701 of the United States Revised Statutes, among other matters, provides as follows:

> "The Supreme Court may affirm, modify or reverse any judgment or decree or order of a circuit court, or district court acting as a circuit court,

> or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require."

This section of the United States Revised Statutes was not repealed by the judicial code, and is still in force and effect.

By Section 11 (26 Stat. L. 829) of the Act of March 3, 1891 (Chap. 517, 26 Stat. L. 826), establishing the Circuit Court of Appeals, it is provided, among other things, as follows:

> "And all provisions of law now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this Act in respect of the circuit courts of appeals" etc.

This section of the Act of March 3, 1891, was not repealed by the judicial code and is still in force and effect.

Commenting upon the subject in *Ballew v. The United States,* 160 U. S. 187, 16 U. S. Sup. Ct. Rep. 263, after referring to Section 701 of the United States Revised Statutes and Section 11 of the Act of March 3, 1891, the Supreme Court said:

> "It thus conclusively appears that the authority of this court to reverse and remand, with directions to render such proper judgment as the case might require, upon writs of error in criminal cases to state courts, and to the circuit courts in capital cases, was confessedly conferred by express statutory provisions, and that a like power was conferred upon the circuit courts of appeals and circuit courts in cases where they exercise jurisdiction by

error, in criminal cases, over the district court" (160 U. S. 201, 202; 16 U. S. Sup. Ct. Rep. 268, 269).

Wherefore, said plaintiffs in error and petitioners herein respectfully petition for a rehearing of the judgment rendered herein February 19, 1917, and request that on the rehearing, by supplementary opinion, or otherwise as may seem proper to it, this court express its opinion upon the merits of the case, and thereby determine whether the facts set forth in the "agreed statement of facts" establish the commission by plaintiffs in error or either of them of any offence against the laws of the United States. And said petitioners further request that, if this opinion be in favor of plaintiffs in error, this court direct such judgment to be rendered and such further proceedings to be had in the District Court as the justice of the case may require.

Dated, San Francisco,
March 5, 1917.

Respectfully submitted,

Ralph K. Blair,
Plaintiff in Error and Petitioner herein.

By J. J. Dunne,
Allen G. Wright,
His Attorneys.

Thomas Addis,
Plaintiff in Error and Petitioner herein.

By Henry G. W. Dinkelspiel,
His Attorney.

T. E. K. Cormac,
Of Counsel.

United States of America,
State of California,
City and County of San Francisco.—ss.

I, the undersigned, Allen G. Wright, Esq., of counsel for Ralph K. Blair, plaintiff in error and petitioner herein, on behalf of said plaintiff in error and petitioner and on behalf of Thomas Addis, plaintiff in error and petitioner herein, hereby certify that in my judgment the foregoing petition for a rehearing of the judgment rendered in the above-entitled cause by the above-entitled court on the 19th day of February, 1917, is well founded, and I do certify that the same is not interposed for delay.

Dated, San Francisco,
March 5, 1917.

Allen G. Wright.